OVERSEAS UNION FINANCE LTD. v. M. GOVINDASAMY

[O.C.J. (Abdul Hamid J.) August 11, 1972]

[Kuala Lumpur — Originating Summons No. 407 of 1971]

Moneylenders — Loan transaction — Sale of property — Agreement to pay balance of purchase price by instalments — Execution of charge as security — Moneylending transaction — Whether requirements of Moneylenders Ordinance fulfilled — Moneylenders Ordinance, 1951, s. 16(1).

This was an application by the chargee to show cause why a certain piece of land belonging to the respondent/chargor, should not be sold by public auction for the recovery of a sum of $13,165.95, with interest.

The affidavit disclosed that the respondent, by charge dated September 18, 1968, charged the said land in favour of the applicant to secure repayment of a sum of $13,500. Under the memorandum of charge, the respondent was to pay the principal sum with interest, by monthly instalments of $199.80. The respondent failed to pay the monthly instalments commencing from August 1, 1970, and the sum of $13,165.95 remained outstanding.

On May 1, 1971, the applicant served a notice on the respondent in accordance with section 255 of the National Land Code, demanding payment. The respondent failed to pay.

The respondent opposed this present application, contending that the applicant was a licensed moneylender, but failed to comply with the provisions of the Moneylenders Ordinance 1951. He further contended that the demand under the Land Code was defective in that the applicant had failed to comply with the provisions of sections 19 and 21 of the said Ordinance.

The applicant maintained that it was a housing developer and had sold the said property to the respondent for $16,000. It was agreed that the respondent would pay the balance sum of $13,500 by instalments, and pursuant thereto, the company transferred the said property to the respondent for a consideration of $16,000 and the respondent executed a charge to secure payment of the balance of the purchase price.

The court had to consider whether the transaction constituted a moneylending transaction within the meaning of the Moneylenders Ordinance, and if it was, whether the applicant had failed to comply with the provisions of the said Ordinance.

Held, dismissing the application: (1) the circumstances of this case, showed that this was a loan transaction, as was evident from the memorandum of charge. It was also evident that the applicant was taking a mortgage as security for a loan. It was plainly within the contemplation of the parties that the respondent was to execute a mortgage to secure repayment of the loan made by the applicant in the course of its business. Therefore, the transaction was essentially a moneylending transaction which had to comply strictly with the provisions of the Moneylenders Ordinance;

(2) the onus was on the applicant to show that the requirements of the Moneylenders Ordinance had been fulfilled. Since it had not replied to the affidavit affirmed by the respondent, the court had to accept as a fact that no memorandum of contract had been delivered to the respondent as required by section 16(1) of the Moneylenders Ordinance;

(3) therefore, the application must be dismissed with costs, with liberty to the respondent to apply for consequential reliefs.

Cases referred to:-

(1) *Poh Kim Kang & Ors.* v. *Ishak bin Lambik & Anor.* [1971] 2 M.L.J. 251.

(2) *Newton* v. *Pyke* (1908), 25 T.L.R. 127.

(3) *Overseas Union Finance Ltd.* v. *Lim Joo Chong* [1971] 2 M.L.J. 124.

SUMMONS.

Ronald Yeo for the applicant.

S. A. Raj for the respondent.

Abdul Hamid J.: In this application the Overseas Union Finance Limited is asking the respondent to show cause why the whole land held under Q.T.(M) No. 154 L.O. No. 9601 in the mukim of Petaling, Selangor, should not be sold by public auction for the recovery of a sum of $13,165.95 with interest on the said sum at the rate of 12% *per annum.*

The affidavit in support of the application discloses that the respondent by charge dated September 18, 1968 registered as presentation No. 3978 Vol. XIX, folio 199 charged the said land in favour of the applicant to secure repayment of a sum of $13,500.

Under clauses 1 and 2 of the memorandum of charge, the respondent was to pay the principal sum with interest thereon by monthly instalments of $199.80. The applicant was at liberty to demand immediate payment of the principal sum and interest thereon in the event of default being made by the respondent in payment of any of the sums secured.

The respondent failed to pay the monthly instalments commencing from August 1, 1970. The principal together with capitalised interest stood at $13,165.95 on January 1, 1971. The applicant served on the respondent a notice dated May 1, 1971 in accordance with section 255 of the National Land Code demanding payment of the principal sum of $13,165.95 with interest thereon at the rate of 12% *per annum.* The respondent failed to pay the sum demanded.

The respondent who opposed the application contended that the applicant was a licensed moneylender bound by the provisions of the Moneylenders Ordinance, 1951, and, as moneylender, the applicant failed and neglected to comply with the provisions of the said Ordinance in that —

(a) no memorandum of the contract has been made and signed and/or executed and no authenticated copy thereof has been delivered as required under section 16(1) of the said Ordinance; and

(b) no statement of account as required under section 21(1) of the said Ordinance has been produced and that section 19 of the said Ordinance has not been complied with.

The respondent further contended that the demand made under the Land Code was defective in that the applicant has failed to comply with the provisions of sections 19 and 21 of the said Ordinance.

In reply the applicant maintained that the applicant was/is a housing developer and had sold the houses in the development of Puchong Gardens to various purchasers including the respondent. The property which is the subject matter of the proceedings was sold to the respondent at a purchase price of $16,000. It was agreed that the respondent would pay the balance sum of $13,500 by instalments. Pursuant thereto the company transferred the said property to the respondent for a consideration of $16,000 and the respondent executed the charge to secure payment of the balance of the purchase price.

The applicant further maintained that the question of loan did not arise and the transaction was therefore not subject to the provisions of the Moneylenders Ordinance.

The applicant did not dispute that, at the date of the charge, the company was also a licensed moneylender. The only question for the court to consider is whether the transaction constituted a moneylending transaction within the meaning of the Moneylenders Ordinance, and, if it was, whether the applicant has failed to comply with the provisions of the said Ordinance.

Mr. Ronald Yeo counsel for the applicant submitted that to constitute a moneylending transaction there must first of all be a loan. He cited the case of *Poh Kim Kang & Ors.* v. *Ishak bin Lambik & Anor.*[1] in support of his contention. In that case, Winslow J. at page 251 held that —

"... The question whether the plaintiff were carrying on the business of moneylenders cannot arise unless a finding is made by the court that there was a loan in the first instance."

In that case the plaintiff contracted with the first defendant to purchase certain property for a sum of $251,379.39. The first defendant only paid $25,138 being 10% deposit, plus $72,871.33. A sum of $160,000 remained outstanding as balance of the purchase price. The plaintiff agreed to take a mortgage of the property from the first defendant for $160,000 with interest at $1,600 *per mensem.* No money actually passed between mortgagor and mortgagee before execution of the mortgage.

It is pertinent to observe that in the course of the judgment Winslow J. at page 251 column 2 said: —

"... certain conflicting views have been expressed in Australia on whether a person lending money on mortagge is truly a moneylender within the relevant legislation or merely a financier, especially where he takes mortgages as investments and not in the course of the business of lending money with a view to profit [see *Lapin* v. *Abigail* and *Bull* v. *Simpson*]. Fine distinctions appear to have been sought to be drawn between persons investing by taking mortgages against loans as a business. To the former class regarded as non-moneylending investors belongs the Sydney solicitor in *Lapin* v. *Abigail, supra,* who was held not to be a moneylender despite his lending a considerable amount of money over two years on a considerable number of loans made otherwise than in the course of his practice as solicitor. As Isaacs J. said, after stating that he had serious difficulty in coming judicially to the same conclusion as the other members of the High Court of Australia who held that the solicitor was not a moneylender:- 'Philanthropy may be safely put aside. For income tax purposes, there is little doubt loans would be set against gains. Investment, having regard to the range of amounts and the absence of any evidence as to long terms, is hardly a legitimate conclusion. What, then, is the proper category? The only method of escape that occurs to me is simply to style Abigail a 'financier', and under that colourless but euphemistic and dignified appellation leave him to lend money systematically at interest and on security very much as a moneylender does, but with susceptibilities saved and immunity preserved.'

As *Pannam* in 'Law of Money Lenders in Australia and New Zealand' points out at page 44 of his 1965 edition:

'It is of course possible to invest money in loans without becoming a moneylender. But when investment becomes a business then the legislation applies.'

I accept the proposition that a loan on mortgage can be a moneylending transaction within our Ordinance provided it is established as a fact that the person lending the money does so as a business."

Reference was also made to the cases cited in footnote (o) of *Halsbury's* Laws of England, 3rd ed., vol. 27 at page 31 concerning the expression "moneylender". Our Moneylenders Ordinance (section 2) defines the expression "moneylender" as "every person whose business is that of moneylending or who carries on or advertises or announces himself or holds himself out in any way as carrying on that business..." and gives certain classes of persons who are not included in that expression. It is important to determine what is a moneylender within the definition of section 2 which contains the expression of "any person *bona fide* carrying on any business having for its primary object the lending of money in the course of which and for the purposes whereof he lends money." The authority seems to show that whether a person is carrying on the business of moneylender is in each case a question of fact. Waldon J. in *Newton* v. *Pyke*[2] at page 128 said that: —

"... Whether a man was carrying on business as a moneylender must be, as was pointed out in *'Litchfield* v. *Dreyfus' (supra)* a question of fact in each case. It seemed impossible to lay down any definition or description which would be of much assistance but he (the learned Judge) felt that it was not enough merely to show that a man had on several occasions lent money at remunerative rates of interest; there must be a certain degree of system and continuity about the transactions." [*Litchfield* v. *Dreyfus,* 22 T.L.R. 385; (1906) 1 K.B. 584].

As regards the case cited by Mr. Ronald Yeo, the position in that case is quite different from the position in the instant case. There the plaintiff and the first defendant were, in the first instance, vendors and purchasers respectively of the property concerned and the charge was executed in favour of the plaintiff pursuant to a subsequent agreement. The facts in *Overseas Union Finance Ltd.* v. *Lim Joo Chong*[3] the case cited by Mr. S. A. Raj counsel for the respondent are, however, somewhat similar to the facts of the present case except that in that case a memorandum of agreement for the loan pursuant to section 16 of the Moneylenders Ordinance, 1951 was drawn and signed by the parties concerned. In the present case, the fact that there was a loan is evident from the memorandum of charge which stated that: —

"The said land is together with the buildings ..... charged for the benefit of the Chargee with the repayment on demand of the sum of $13,500 (Dollars Thirteen Thousand and Five Hundred only) *lent* to the Chargor by the Chargee (which said sum is hereinafter referred to as 'the principal sum') together with interest thereon at the rate of Twelve *per centum* (12%) *per annum* ..... the Chargor shall pay the principal sum with interest thereon ..... by monthly instalments of Dollars One Hundred and Ninety-nine and Cents Eighty only ($199.80)....."

In the circumstances of this particular case it is also evident that the applicant was taking a mortgage on loan as a business. Essentially the applicant was carrying on business of moneylending. Even though the applicant company's memorandum of association has set out numerous objects for which the company has been established, it it apparent that the company was carrying on activities particularly concerned with the lending of money. It was plainly within the contemplation of the parties that the respondent was to execute a mortgage to secure repayment of the loan made by the applicant in the course of its business. The transaction was therefore essentially a moneylending transaction, and, as such, there must be strict compliance with the provisions of the Moneylenders Ordinance.

Having concluded that the transaction was a moneylending transaction the onus is therefore on the applicant, the party seeking to enforce the contract, to show that the requirements of the Moneylenders Ordinance have been fulfilled. Since the applicant has not replied to the affidavit affirmed by the respondent alleging that there was failure to comply with the provisions of the Moneylenders Ordinance, I would therefore accept as a fact that no memorandum of contract has been delivered to the respondent as required by section 16(1) of the said Ordinance.

For reasons which I have stated, it is therefore my judgment that this application is not enforceable and I would dismiss this application with costs with liberty to the respondent to apply for consequential reliefs.

Application dismissed.

Solicitors: *Yeo & Yeo; Clough Thuraisingham & Co. and Raj & Co.*

G. H. v. COMPTROLLER-GENERAL OF INLAND REVENUE

[A.C.J. (Gill F.J.) August 19. 1972]

[Kuala Lumpur — Originating Motion No. 2 of 1972]

Income Tax — Ex gratia payment — Whether sum of money paid to taxpayer was voluntary and not a gain or profit from an employment — Whether it should be treated as compensation for loss of office or as a gratuity — Income Tax Act, 1967, ss. 4(b), 13(1)(a), (e), Sch. 6, para. 15.

This was an appeal by way of a case stated from an order of the Special Commissioners of Income Tax, confirming the assessment by the respondent to tax, as a gratuity, the sum of $32,000, under section 13(1)(a) of the Income Tax Act, 1967. This sum was paid to the appellant *ex gratia* on the termination of his fifth contract of service with his employers by the giving of three month's notice as provided under the contract.

The special commissioners concluded that as the appellant was not a permanent employee of the company, the sum of $32,000 paid to him was not compensation for loss of office but a gratuity in respect of services rendered and as such liable to income tax under section 13(1)(a) of the Income Tax Act, 1967.

The main ground of appeal was that as the appellant had a reasonable expectation of continued employment, the sum of $32,000 was paid to him by way of compensation for loss of employment.

The question of law to be decided was whether, on the facts as found by the special commissioners, the sum of $32,000 should be treated as compensation for loss of office under section 13(1)(e), or as a gratuity under section 13(1)(a) of the Act. An additional question was raised as to whether the said sum was a voluntary payment and therefore not a gain or profit from an employment within the meaning of sections 4(b) and 13(1)(a) of the said Act, and as such, outside the scope of the Act.

Held, dismissing the appeal: (1) the payment to the appellant was made in reference to his services and was something in the nature of a reward for his services. It was in no way related to the period for which he could have gone on working had he been kept in employment until the retiring age. Therefore, the *ex gratia* payment of $32,000 was liable to tax as a gratuity in respect of services rendered under section 13(1)(a) of the Income Tax Act, 1967;

(2) in this case, the evidence showed that the payment was made in reference to, and by virtue of the appellant's employment. Therefore, it was not a voluntary payment so as to make it wholly exempt from income tax by virtue of paragraph 15 of Schedule 6 to the said Act.

Cases referred to:-

(1) *Chibbett* v. *Joseph Robinson & Sons* 9 T.C. 48, 61.

(2) *Comptroller-General of Inland Revenue* v. *T.* [1970] 2 M.L.J. 35, 39.

(3) *McClelland* v. *Northern Ireland General Health Services Board* [1957] 2 All E.R. 129.

(4) *Holloway* v. *Poplar Corporation* [1940] 1 K.B. 173, 178.

(5) *Beynon (H.M. Inspector of Taxes)* v. *Thorpe* 14 T.C. 1.

(6) *Duncan's Executors* v. *Farmer* 5 T.C. 417, 422.

(7) *Hochstrasser (Inspector of Taxes)* v. *Mayes* [1960] A.C. 376, 387.

(8) *Commissioners of Inland Revenue* v. *Wesleyan and General Assurance Society* 30 T.C. 11, 25.

INCOME TAX CASE STATED.

S. Woodhull for the appellant.

Rahmat bin Jamari (Senior Federal Counsel) for the respondent.

Gill F.J.: This is an appeal by way of case stated from an order of the Special Commissioners of Income Tax confirming the assessment by the Comptroller-General of Inland Revenue (the respondent) to income tax, as a gratuity under section 13(1)(a) of the Income Tax Act, 1967, the sum of $32,000 which was paid to the appellant *ex gratia* on the termination of his fifth contract of service with his employers by the giving of a three month's notice as provided under the contract to expire at the end of the period of the contract.

The facts as found by the special commissioners, about which there is no dispute, are that the appellant served his employers under five separate contracts of employment commencing on April 24, 1951, February 26, 1956, August 21, 1959, March 27, 1963 and October 26, 1966 respectively. Under each of the contracts the employer had a right to terminate the appellant's employment at any time during the period of the contract by giving him three calendar months' notice or by paying three calendar months' salary in lieu of notice. Although the appellant was in continuous employment up to October 31, 1968 when he was 41 years of age, which meant that the total period of his employment was 17½ years, he was in fact re-engaged at the commencement of each of his contracts of service.

His first contract of service, under a written agreement dated April 24, 1951 between him and the Oriental Estates Agency, London, was for a period of four years at the end of which he was given eight months' leave. His next three contracts were for periods of three years each followed by six months' leave at the end of each period, there being a further written agreement during this period dated March 27, 1962 between him and Sime Darby Holdings Limited. Clause 2 of this latter agreement reads:

"The period of service shall be deemed to have begun and shall continue for a period of three years or such other period as shall be agreed with the Agents from the date of last returning to Malaya for service under the terms of the previously existing Agreement with Oriental Estates Agency Limited, London, and thereafter (unless the same shall have